

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

LE SHAWN NICKELSON,

:

Petitioner,

Case No. 1:11-cv-334

:

-vs-

District Judge S. Arthur Spiegel

Magistrate Judge Michael R. Merz

Warden, Chillicothe Correctional Institution,

:

Respondent.

DECISION AND ORDER

This habeas corpus case is before the Court on a number of motions filed by Petitioner which are ruled on as follows:

1. Motion for Leave to File Letter of Appointment of Counsel (Doc. No. 5) which the Court construes as a request for appointment of counsel to assist Petitioner in this case. The Rules Governing § 2254 Cases require the appointment of counsel only in cases where an evidentiary hearing is required. The holding of such hearings, at least on issues decided prior to the federal filing in state court, has been greatly restricted by *Cullen v. Pinholster*, 131 S. Ct. 1388, 1400-01, 179 L. Ed. 2d 557 (2011), and in any event has not yet been ordered in this case. The Motion is therefore denied without prejudice to renewal if an evidentiary hearing is ordered.
2. Motion for Leave to File Interrogatories and Motion and for Waive Electronic Copy (Doc. No. 6); Motion Civil Rule 33 Interrogatories (Doc. No. 7). The Motions are denied as the

Petitioner has not yet been granted leave to conduct any discovery under Rule 6 of the Rules Governing § 2254 Cases. In addition, many of the interrogatories are improper in form and it is unclear to whom they are, or properly should be, addressed.

3. Motion to Waive Electronic Copy of Civil Rule 33 Interrogatories Questions (Doc. No. 8); Motion for Leave to File Waive Electronic Copy of Civil Rul [sic] Admissions (Doc. No. 10). These Motions are granted in part. Without ruling on the substance of the documents Petitioner wishes to file, Petitioner is excused from filing electronically because of his incarceration and *pro se* status. Petitioner will have fulfilled his requirements on filing any document if the document is sent in paper to the Clerk, a copy is mailed to Respondent's counsel, and Petitioner includes on the paper original a certificate that he has mailed a copy to Respondent's counsel.
4. Motion for Leave to File Civil Rule 36 Requests for Admissions (Doc. No. 9); Motion for Civil Rule 36 Requests for Admissions (Doc. No. 11). These Motions are denied for the same reasons given above for Doc. Nos. 6 and 7.
5. Motion for Leave to File Civil Rule 37 (Doc. No. 14); Motion for Leave to File Reply to Respondent's Motion in Opposition to Petitioner's Motion for Leave to File Civ. R. 37 (Doc. No. 16); Motion to Reply Why Leave Should Be Granted (Doc. No. 17); Motion Civil Rule 37 Federal Rules of Civil Procedure 37, Failure to Make Disclosures or to Cooperate in Discovery (Doc. No. 18); Federal Rules of Civil Procedure Rule 37 Motion for an Order Compelling Discovery or Discovery Second Request (Doc. No. 21).

Each of these Motions is denied. Unlike the situation under the Federal Rules of Civil Procedure, discovery in a habeas corpus case is not a procedural right of the parties. Rather,

under Rule 6 of the Rules Governing § 2254 Cases, a party must have leave of court to conduct discovery and leave is granted only upon a prior showing of good cause. Petitioner has not been granted leave to conduct discovery in this case and therefore his filing of interrogatories and requests for admission had no legal effect – Respondent had no obligation to provide the information sought. Because Respondent has not failed to cooperate with discovery ordered by the Court, it would be improper to enter an order compelling discovery. Moreover, Fed. R. Civ. P. 37(a)(1) provides that a motion to compel must include a certification of a good faith effort to obtain the discovery without a motion.

6. Motion for Leave to File Summary Judgment (Doc. No. 20). This Motion is granted. The Clerk shall detach Attachment 1 from the Motion and file it separately as Petitioner's Motion for Summary Judgment.

December 13, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge